

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ADIL SHAFI, an individual,

Defendant/Counterclaim Plaintiff

Case No. 09-10454

v.

Hon. Victoria A. Roberts

BRAINTECH, INC, a Nevada corporation,

Counterclaim Defendant,

and

FREDERICK WEIDINGER, an individual,

Additional Counterclaim Defendant.

RESPONSE OF ADIL SHAFI TO THIRD-PARTY DEFENDANT FREDERICK WEIDINGER'S MOTION AND BRIEF FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN SUPPORT OF JOINT MOTION FOR SUMMARY JUDGMENT

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I. ARGUMENT

Braintech filed this case on February 6, 2009. Weidinger was made a party on April 22, 2009 by Shafi's counter-claim. The Court established a cutoff date to file dispositive motions by November 19, 2010. Braintech and Weidinger filed a joint motion for summary judgment on November 19, 2010, and the parties *fully* argued and briefed the issues with a response by Shafi, reply by Braintech and Weidinger, and sur-reply by Shafi. Now, more than two years after the case was filed and four months after the dispositive motion cutoff date, with trial scheduled for May 10, Weidinger moves the Court to allow him to file what essentially amounts to another motion for summary judgment by introducing a new legal argument.

Weidinger's motion for leave to file a supplemental brief lacks any legal support or authority. The one case cited by Weidinger in support of his motion is an unpublished district court case from the U.S. District Court of New Mexico. (See Weidinger Motion, p. 2; citing *Duprey v. Twelfth Judicial District Court*, No. 08-0756, 2009 U.S. Dist. LEXIS 78059 at *11 (D.N.M. 2009)). This case does not address the issue posed by Weidinger. In *Duprey v. Twelfth Judicial District Court*, the New Mexico federal district court allowed the submission of a *supplemental authority* pertaining to a legal argument already raised in a motion filed within the court's briefing schedule. See *Id.*, at *7 & 10-11.

Weidinger does not offer supplemental authority but rather wants a second bite at the apple by introducing new legal issues and defenses.¹ *Duprey* does not provide support for Weidinger's proposition that he should be allowed to raise new legal issues and defenses. Other than *Duprey*, Weidinger provides no other legal basis as to why this Court should allow him to disregard the Court's briefing schedule and derail the trial scheduled for May 10, 2011.

Pursuant to Local Rule 7.1, supplemental briefing, such as filing more than one motion for summary judgment or more than one response to a motion for summary judgment, is not provided as a matter of right but by leave of court. See *Ashford v. County of Saginaw*, 2010 U.S. Dist. LEXIS 117658 (E.D. Mich. Nov. 4, 2010); see also E.D. Mich. Local Rule 7.1(b)(2)&(c)(3). Weidinger has not provided a compelling reason or basis in law why this Court should allow him to file a supplemental brief. Weidinger had every opportunity to argue this in his motion for summary judgment filed in November 2010, but failed to do so. To raise this legal argument now amounts to an additional motion for summary judgment and would require amending the Court's scheduling order. "A schedul[ing] order may be modified only for good cause and with the judge's consent." Fed. R. Civ. Proc. 16(b)(4). Weidinger has not shown good cause as to why the Court's scheduling order should be modified, especially since he had the opportunity to make an argument involving the integration clause in his November 2010 motion.

¹ The integration issue raised by Weidinger does not even apply to Weidinger. The contracts at issue are between Braintech and Shafi.

Weidinger also argues Shafi's claim involving fraud is barred under the legal defense of "puffing." Weidinger has already addressed this issue in his motion for summary judgment and in his response. His proposed supplemental brief adds nothing new to the arguments.

Weidinger's motion for leave to file a supplemental brief should be denied because the parties have had ample opportunity to argue the issues involved in this case and Weidinger has failed to provide a compelling reason as to why this Court should allow his motion to leave to file a supplemental brief.

Respectfully submitted,

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Dated: March 21, 2011

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

I hereby certify that on the 21st day of March, 2011, a copy of the foregoing Response of Adil Shafi to Third-Party Defendant Frederick Weidinger's Motion and Brief for Leave to File Supplemental Brief in Support of Joint Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Respectfully submitted,

BERRY MOORMAN P.C.

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